

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





75-6096

Signed

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

B

ROBERT J. MYKINS,

Plaintiff-Appellee

P/S

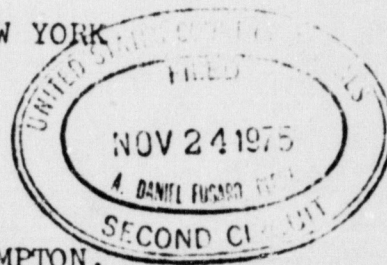
v.

UNITED STATES TREASURY DEPARTMENT,  
INTERNAL REVENUE SERVICE,

Defendant-Appellant

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT



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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 75-6096

ROBERT J. MYKINS,

Plaintiff-Appellee

v.

UNITED STATES TREASURY DEPARTMENT,  
INTERNAL REVENUE SERVICE,

Defendant-Appellant

---

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

---

BRIEF FOR THE APPELLANT

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred in enjoining the United States from seizing assets of William B. Duffy Carting Company, Inc.
2. Whether the District Court erred in failing to enter findings of fact and conclusions of law when it entered an order enjoining the United States.



STATEMENT OF THE CASE

This appeal is taken from an order of the United States District Court for the Western District of New York entered July 28, 1975 (Judge Burke), enjoining the United States Treasury Department, Internal Revenue Service, "from seizing any assets of William B. Duffy Carting Company, Inc. in which the plaintiff [Robert J. Mykins] claims a security interest until such time as this Court shall enter a further order herein." (R. <sup>1/</sup>67.) The United States filed a notice of appeal on September 25, 1975. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1292(a)(1).

The circumstances surrounding the granting of that order are as follows:

Robert J. Mykins, the plaintiff, filed a complaint alleging that he, together with Robert H. Schmidhammer, entered into a management agreement with William B. Duffy Carting Company, Inc. ("Duffy") on July 16, 1974, pursuant to which Mykins advanced certain funds to Duffy. Mykins alleged in his complaint that he and Duffy entered into a Security Agreement on July 17, 1974, "in which the plaintiff herein obtained a security interest in all of Wm. B. Duffy Carting Company, Inc. personal property, debtors accounts, contract rights, chattel paper, accounts and contract rights now owned or hereinafter owned by Wm. B. Duffy Carting

1/ "R." references are to the separately bound record appendix.

Company, Inc." The security agreement annexed to the complaint, however, states that the security interest ran only to Duffy's current and after-acquired "Accounts, Contract Rights or Chattel Paper." The complaint went on to allege that Mykins had filed financing statements, copies of which were also attached to the complaint, in the office of the Monroe County clerk's office on July 17, 1974, and in the office of the Secretary of State of New York on September 26, 1974. These financing statements, however, asserted a security interest in a more limited class of Duffy's assets than was set forth in Mykins' complaint. The financing statement filed with the Monroe County clerk's office merely advised that a security agreement existed between the parties covering "ALL ACCOUNTS RECEIVABLES", together with "Proceeds". The financing statement filed with the New York Secretary of State similarly advised that a security agreement existed between the parties covering "ALL ACCOUNTS RECEIVABLE DUE AND THAT COME DUE", together with "Proceeds" and "Products of the Collateral". (R. 2-5, 9-11.)

In his complaint, Mykins further alleged that the United States Treasury Department had filed a federal tax lien in the amount of \$78,681.29 against Duffy with the Monroe County clerk's office on or about January 21, 1975, that it had seized various items of Duffy's personal property, that it had sold that property at a public sale on May 15, 1975, and that it had received \$11,892 at the sale which it applied against taxes due



and owing by Duffy<sup>2/</sup>. Mykins alleged that this seizure was in violation of the security agreement because "plaintiff's security interest was perfected prior to the filing of defendant's federal tax lien", and that the proceeds of sale should have been paid over to him<sup>3/</sup>. He demanded judgment against the defendant in the sum of \$11,892, plus interest. Further, Mykins alleged that pursuant to the federal tax lien of January 21, 1975, the defendant "has issued several notices of levy to the debtors of Wm. B. Duffy Carting Company, Inc." which had "impaired the security interest of the plaintiff", that he had no adequate remedy at law, and requested (R. 2-5):

<sup>2/</sup> An affidavit of Joseph A. Vitalone, a revenue officer for the Internal Revenue Service, asserts that in addition to the notice of federal tax lien filed with the Monroe County clerk's office, notices of federal tax liens were also filed with the New York Secretary of State on January 22, May 20 and June 5, 1975. Vitalone further stated that the Internal Revenue Service had seized the "operating rights of the taxpayer, William B. Duffy Carting Co., Inc., as evidenced by New York State Department of Transportation Certificate of Public Convenience and Necessity Number 3270 and Interstate Commerce Commission Certificate of Public Convenience and Necessity Numbers MC 71337, and MC 71337 Sub 5", and that Duffy "has continued to operate and has earned accounts receivable in which the United States of America has a first lien by virtue of the several filings of Notices of Federal Tax Lien", but which Mykins was collecting. (R. 69-70.)

<sup>3/</sup> On April 10, 1975, a notice of levy was served upon Duffy's representative which contained an itemized list of Duffy's seized trucks, trailers, equipment, and transportation operating licences. Some of the trucks, trailers and equipment were sold at public auction on May 15, 1975, for a net amount of \$11,691.30, with the amount being applied against Duffy's payroll tax liabilities for the quarter ending March 31, 1974, and its federal highway use tax liabilities for the taxable periods ending June 30, 1974, and June 30, 1975.

A. That defendant herein be enjoined from issuing any notices of levy pursuant to its federal tax lien of January 21, 1975 until such time as plaintiff's security interest in Mr. B. Duffy Carting Company, Inc. has been satisfied.

B. That all persons and/or corporations upon whom said notices of levy have been served shall be enjoined from paying any monies over to the defendant herein until such time as plaintiff's security interest has been satisfied.

The United States filed a motion to dismiss the complaint, on the grounds that the complaint failed to state a cause of action upon which the court could grant relief, that the court lacked jurisdiction over the United States, which had not waived its sovereign immunity, and that the complaint sought injunctive relief which was prohibited by Section 7421(a) of the 1954 Internal Revenue Code.

In a July 28, 1975, hearing the District Court entered an order directing Mykins to respond to the United States' motion to dismiss on or before September 15, 1975, and enjoined the Government from seizing any of Duffy's assets in which Mykins claimed an interest until further order of the court. In a subsequent hearing on August 6, 1975, before Judge Elfvin, the Government's request that the plaintiff be required to post a bond was denied. (R. 57-66, 74, 121.)

The Government thereafter timely filed a notice of appeal.



SUMMARY OF ARGUMENT

In this suit by a creditor against the Government for a money judgment and an injunction against the United States restraining it from further levying upon the debtor's assets, the District Court issued an order enjoining the United States from pursuing collection activity with respect to the debtor's assets.

This order cannot be sustained. The injunction violates the provisions of Section 7421 of the 1954 Internal Revenue Code, except as to the debtor's accounts receivable. Section 7421 bars all injunctions restraining the collection of taxes except for those specific exceptions enumerated in the Code. The creditor here claimed that his suit was brought pursuant to Section 7426 of the Code, which permits a court to enjoin enforcement of outstanding tax levies if enforcement of those levies would defeat security interests having priority over the tax collector's claim. However, the facts as alleged in the creditor's complaint demonstrated that his security interest covered, if anything, only the debtor's accounts receivable. The injunction that was issued prohibited collection activity not only with respect to the debtor's accounts receivable, but also with respect to a much broader class of assets and not only enjoined enforcement of outstanding levies but barred issuance of new levies. Accordingly, the injunction below was broader than permitted by Section 7426 and thus contrary to the anti-injunction prescription of Section 7421.

And, not only was the injunction below counter to Section 7421, but the manner in which it was issued was contrary to the provisions of the Federal Rules of Civil Procedure. Rule 52(a) of the Rules requires that a District Court enter findings of fact and conclusions of law when it issues preliminary injunctions. The court below failed to do so. Accordingly, even the small portion of the injunction below which conceivably might have fallen within the Court's power under Section 7426 of the Code must be reversed and remanded for the entry of such findings.

#### ARGUMENT

##### I

#### INTRODUCTION

This suit was brought by Robert J. Mykins against the Internal Revenue Service allegedly to protect Mykins' security interest in certain property owned by the William B. Duffy Carting Co., Inc. Mykins alleged that he had lent Duffy money and that he had obtained a perfected security interest in certain of Duffy's assets as security for those loans. He further alleged that the Internal Revenue Service had seized and sold certain of Duffy's property to meet Duffy's past due tax liabilities and was then proceeding to seize other assets owned by Duffy. Mykins sought an order requiring the Internal Revenue Service to turn over the proceeds realized on the sale of the seized property and, additionally, orders enjoining the Internal Revenue Service from "issuing any notices of levy \* \* \* until such time as \* \* \* [his] security interest in Wm. B. Duffy



Carting Company, Inc. has been satisfied" and enjoining all parties upon whom notices of levy had previously been served "from paying any monies over to the \* \* \* [Internal Revenue Service] until such time as \* \* \* [Mykins'] security interest has been satisfied." (R. 5.)

The Government filed a motion to dismiss the complaint and the court below held a hearing on the matter on June 28, 1975. At the conclusion of that hearing, the court entered an order enjoining the Internal Revenue Service from "seizing any assets of William B. Duffy Carting, Inc. in which plaintiff [Mykins] claims a security interest until such time as this Court shall enter a further order herein." (R. 67.) No further order has been entered.<sup>4/</sup>

We submit that the District Court erred in granting this injunction. As the Supreme Court (Bob Jones University v. Simon,

<sup>4/</sup> We have been informed that on October 29, 1975, William B. Duffy Carting Company, Inc., filed a petition under Chapter XI of the Bankruptcy Act c. 541, 30 Stat. 544 (11 U.S.C.), in the United States District Court. Despite the fact that the tax debtor has filed a petition under Chapter XI of the Bankruptcy Act, the issue of the propriety of the district court's issuance of an injunction has immediate importance. The right to initiate further collection activity may still be a significant right. Even assuming, arguendo, that the Bankruptcy court has already issued an order prohibiting further collection activity outside the Bankruptcy court, the Bankruptcy proceedings may be terminated in the future and prompt creditor action may again become an important matter. Moreover, the present injunction arguably precludes the Internal Revenue Service from proceeding further with the sale of the debtor's assets upon which it has already levied or which it has in its possession. Under Phelps v. United States, 43 U.S. Law Week 4500 (Sup. Ct., May 19, 1974) the claim of the United States to such assets is apparently superior to that of the trustee in bankruptcy. Further, the United States prior to the issuance of this injunction seized Duffy's operating rights. The possibility that these valuable operating rights may decrease substantially in value if the tax debtor is unable to continue in business presents one more reason why prompt resolution of the injunction's propriety is imperative.

416 U.S. 725 (1974) has recognized, except in very exceptional circumstances, Congress intended that tax collection activity not be halted by judicial orders. Thus, Section 7421 of the Internal Revenue Code of 1954, Appendix, infra, provides that, in general--

\* \* \* no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The one exception to this Congressional policy against judicial intervention in tax collection activities that is here relevant<sup>5/</sup> is found in Section 7426 of the Internal Revenue Code of 1954, Appendix, infra. That Section provides--

(a) Actions Permitted--

(1) Wrongful levy--If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an

<sup>5/</sup> The other exceptions enunciated in Section 7421 involve situations where deficiency notices were not issued or were improperly issued (Internal Revenue Code of 1954, Sections 6212 (c) and (e) (26 U.S.C.)) or situations in which taxpayers have brought suit in the Tax Court (Section 6213(a) (26 U.S.C.)). There is nothing in the record to indicate that there were any problems with deficiency notices which might have been issued to Duffy or that there was any action related to the present tax liabilities pending in the Tax Court. There is, of course, one additional exception to the anti-injunction policy of Section 7421, the judicially created exception enunciated in Enochs v. Williams Packing Co., 370 U.S. 1 (1962). Under that exception to the anti-injunction policy, an injunction may issue if equity jurisdiction exists and it is clear that under no circumstances could the Government ultimately prevail. As we shall show, the Government ought to prevail as to most of the matters here involved so there was no basis for application of the Enochs exception to the anti-injunction statute.



interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

\* \* \*

(b) Adjudication.--The district court shall jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction.--If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

\* \* \*

We contend that the injunction granted below runs counter to the anti-injunction provisions of Section 7421 and that it fails in many critical respects to come within the exception to that statute set forth in Section 7426. Specifically, we contend that the injunction forbids Internal Revenue Service collection activity with respect to certain assets in which Mykins, under the most expansive reading of the pleadings below, cannot even claim to have a security interest and that forbids certain collection activities which, under the applicable provisions of Sections 7421 and 7426 of the Internal Revenue Code of 1954, the district court was without power to enjoin. Moreover, the injunction that was issued was entered in

contravention of Rule 52 of the Federal Rules of Civil Procedure and must in any event be reversed and remanded because of that procedural default.

II

THE INJUNCTION ISSUED  
BELOW WAS OVERLY BROAD

Section 7426 of the 1954 Internal Revenue Code permits suits by third parties against the United States where the Government has "wrongfully levied" upon property in which such person "claims an interest in or lien on such property". Sec. 7426(a) of the Code. This statute, however, does not give the District Court unlimited power to award relief in such suits. Instead, under the statute the relief the court may award is limited to the awarding of the property, or a money judgment, if the court determines that property has been wrongfully levied upon. (Sec. 7426(b)(2-4).) The statute goes on to provide that a court may grant an injunction to "prohibit the enforcement of \* \* \* [a] levy or to prohibit \* \* \* [a] sale," if the "levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property." And see Treasury Regulations on Procedure and Administration (1954 Code), §301.7426-1(b)(1)(i), Appendix, infra, stating that the court, upon a finding that the property has been wrongfully levied upon, may grant an injunction prohibiting the enforcement of a levy or the sale of the property "if such sale would irreparably injure rights in the property



which are superior to the rights of the United States in such property".

The facts, taken from Mykins complaint, show that Mykins' sole claim against Duffy's assets is based upon the security interest which he asserts was obtained upon the signing of the security agreement and the financing statements which he allegedly filed with the Monroe County Clerk's office and with the New York Secretary of State on July 17, 1974, and September 26, 1974, respectively. It is, of course, true that while the Government has a perfected lien for unpaid taxes from the moment that the tax is assessed against a delinquent taxpayer by recording the amount of such tax liability in the office of the District Director of Internal Revenue (United States v. Security Tr. & Sav. Bk., 340 U.S. 47 (1950); Secs. 6201, 6203 and 6321, Internal Revenue Code of 1954 (26 U.S.C.)), this lien is ineffective against "any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" until notice of such lien has been properly filed. Sec. 6323(a), Appendix, infra. This notice was, according to Mykins' complaint, not filed until January 21, 1975. Accordingly, then, to the extent Mykins' security interest in particular assets under the security agreement and financing statements was perfected under state law and choate under federal standards, his lien

6/ In United States v. Pioneer American Ins. Co., 374 U.S. 84, 89 (1963), the Supreme Court ruled that even those liens granted a preferred status by Section 6323 must "have attained the degree of perfection required of other liens and be choate for purposes of the federal rule." A lien is "choate" only when the identity of the lienor, the amount of the lien, and the property which is subject to the lien are certain. Illinois v. Campbell, 329 U.S. 362 (1946); United States v. Security Tr. & Sav. Bk., supra; United States v. New Britain, 347 U.S. 81 (1954).

would have priority over the Government's tax lien, and the District Court would have had jurisdiction to issue the preliminary injunction.

Contrary to the allegations in Mykins' complaint, however, the evidence in the record does not establish that he had a perfected security interest in Duffy's "personal property, debtors accounts, contract rights, chattel paper, accounts and contract rights" (R. 2-3). Under the provisions of the Uniform Commercial Code which are applicable in the State of New York, a creditor must file a financing statement notifying other creditors of the extent of his security interest in the debtor's assets to perfect his interest against the claims of other creditors. Uniform Commercial Code, McKinney's Consol. Laws of N. Y. Ann., §9-302. See L. B. Smith, Inc. v. Foley, 341 F. Supp. 810 (W.D. N.Y., 1972). Section 9-402(1) of the New York Uniform Commercial Code specifically provides that this financing statement--

\* \* \* is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. (Emphasis supplied.)

And see Official Comment, Uniform Commercial Code, supra, §9-402, specifying that such description is sufficient "if it reasonably identifies what is described". As the Fifth Circuit in In re Turnage, 493 F. 2d 505, 506 (1974), stated:



The purpose of filing the financing statement is notice to any third party. The requirement of the description of the collateral is not for the purpose of informing such third party that the exact item which he is considering taking as security is already subject to a prior security interest, without further inquiry, though such could be the result of a full and complete serial number description. The requirement of "a description that reasonably identifies" is satisfied if it reasonably informs third parties that a certain identifiable item, in this case a 1967 BSA motorcycle, belonging to or in the possession of a debtor may be subject to a prior security interest and that further inquiry is necessary to determine if it is the same motorcycle being offered them as collateral. Such is known as "notice filing". It merely places other parties on notice that there is need for investigation before taking as security for a loan items of the same type belonging to the debtor or which he intends to purchase.

Accord, In the Matter of Munger, 495 F. 2d 511, 512 (C.A. 9, 1974):

"Only the most basic description of property deemed to be collateral for a security interest \* \* \* [under Article 9 of the Uniform Commercial Code] is required by C.C.C. § 9402. The test of the sufficiency of the description is whether it would indicate to an interested third party the possible existence of prior encumbrances on the collateral." Cf. In re Laminated Veneers Co., 471 F. 2d 1124 (C.A. 2, 1973). In the instant case, of course, the financing agreements which Mykins filed announced to the world only that he claimed a security interest in Duffy's "accounts receivable". The Uniform Commercial Code's definition of "accounts"--"any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper" (Uniform

Commercial Code, supra, § 9-106)--closely approximates the common understanding of the term "account receivable", which is "Contract obligations owing to a person on open account". Black's Law Dictionary (3d ed.) p. 36. And see Texas Oil & Gas Corp. v. United States, 466 F. 2d 1040 (C.A. 5, 1972). See also In re Varney Wood Products, Inc., 458 F. 2d 435 (C.A. 4, 1972), applying the Uniform Commercial Code definition of "account" to find that the description "account receivable" in a financing statement was sufficient to perfect a security interest in amounts to be received under a contract. Under no stretch of the imagination can the description utilized by Mykins in the financing statements in question be interpreted to cover anything other than the item such financing statements declared as Mykins' sole interest--an interest in Duffy's accounts receivable. Thus, Mykins had a security interest which was perfected, if at all, solely in Duffy's accounts receivable. Accordingly, under the provisions of Section 7426(b)(1) of the Internal Revenue Code the District Court had jurisdiction to issue injunctive relief solely with respect to Duffy's accounts receivable<sup>7/</sup>. As to all other of Duffy's assets, Mykins' lien was subordinate to the Government's perfected lien for taxes. Accordingly, the

<sup>7/</sup> This is not to say, however, that upon remand Mykins' interest in these accounts receivables is conceded by the Government to prime the federal tax lien. Under Section 6323(d) of the Code, Mykins priority position with respect to Duffy's accounts receivables would be effective only as to receivables earned by Duffy before and within forty-five days after the notice of federal tax liens was filed. See Texas Oil & Gas Corp. v. United States, supra.



injunction forbidding collection activity with respect to those assets cannot be upheld. As cogently put by Plumb, Federal Tax Liens (3d ed.), p. 261: "If the third party's lien or other interest is subordinate to the federal tax lien under which the levy is made, he cannot, of course, enjoin a sale of the property."

The injunction issued below, of course, did more than enjoin the seizure of property under previously issued levies. It went further and proscribed the issuance of new levies. This was improper. The legislative history surrounding the enactment of Section 7426 shows that that section was enacted by the Congress in order to give nontaxpayers a remedy in situations where the Government was asserting a claim upon property in which the claimant had an interest. See H. Rep. No. 1884, 89th Cong., 2d Sess., pp. 27-28 (1966-2 Cum. Bull. 815, 834). This legislative history, however, is quite explicit in insisting that an action under the statute will not be permitted unless a levy has actually been made against the complainant's property. Thus, the House Report states specifically that "in no case may such action be brought prior to the time that the Secretary of the Treasury or his delegate has in fact levied upon the property." H. Rep. No. 1884, supra, p. 75 (1966-2 Cum. Bull., p. 869). Accord, S. Rep. No. 1708, 89th Cong., 2d Sess., p. 30 (1966-2 Cum. Bull. 876, 987); stating that a person "may bring suit under this provision once a levy is made". Accordingly, it is well settled that the temporary injunction issued by the lower court was

outside the scope of Section 7426 insofar as it sought to enjoin the Commissioner from issuing any new levies against Duffy's property. Nickerson v. United States, 513 F. 2d 31 (C.A. 1, 1975); Hamilton National Bank of Johnson City v. United States, 367 F. Supp. 1110 (E.D. Tenn., 1972), aff'd per curiam, 486 F. 2d 1405 (C.A. 6, 1973). While the statute allows a court to prevent the enforcement of a levy, it does not authorize the court to enjoin a threatened levy. American Pacific Investment Corp. v. Nash, 342 F. Supp. 797 (N.J., 1972).

### III

THE DISTRICT COURT ERRED WHEN IT FAILED TO  
ENTER FINDINGS OF FACT AS REQUIRED BY RULE  
52 OF THE FEDERAL RULES OF CIVIL PROCEDURE

As we have shown on this record the District Court was without authority to enjoin the tax collector from proceeding against any of Duffy's assets except the accounts receivable in which Mykins had a security interest. Under Section 6323(d) of the Internal Revenue Code of 1954, Appendix, infra. Moreover, Mykins' security interest in Duffy's accounts receivable has priority over the Government's tax lien only as to receivables earned by Duffy prior to the filing of the notice of tax lien and within forty-five days of that filing date. But even conceding, arguendo, that the court below had the authority to grant an injunction preventing Governmental seizure of the small remaining class of assets, there is in this record nothing to indicate that the court below ought to have exercised that power. The court below found no facts and entered no conclusions of law at



the time it issued the injunction. Accordingly, there has been no finding that there was a real probability that Mykins would prevail at trial, or that the relative harm to the parties resulting from the issuance of an injunction weighed in favor of Mykins. See Chappell & Co. v. Frankel, 367 F. 2d 197 (C.A. 2, 1966); West Virginia Highlands Conserv. v. Island Creek Coal Co., 441 F. 2d 232 (C.A. 4, 1971). See Central Gulf Steamship Corp. v. International Paper Co., 477 F. 2d 907 (C.A. 5, 1973). As this Court in Lemelson v. Kellogg Co., 440 F. 2d 986, 988 (1971), (1971), has recognized, a lower court's findings of fact and conclusions of law:

[aid] "the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court," Barron & Holtzoff, Federal Practice and Procedure, § 1121 (Wright Revision 1961), see Fuchstadt v. United States, 434 F. 2d 367 (2 Cir., 1970): \* \* \* [they] makes definite what was decided by the case, Wright, Federal Courts (1963) § 96; and \* \* \* [serve] to revoke "care on the part of the trial judge in ascertaining the facts." United States v. Forness, 125 F. 2d 928, 942 (2 Cir.), cert. denied, sub nom. City of Salamanca v. United States, 316 U.S. 694, 62 S. Ct. 1293, 86 L.Ed. 1764 (1942).

It is undoubtedly for this reason that Rule 52(a) of the Federal Rules of Civil Procedure require the entry of such findings of fact and conclusions of law whenever a court grants a preliminary injunction. The failure of the court below to enter such findings and conclusions was plain error. Accordingly, even the small portion of the present injunction that the District Court had power to grant must be reversed and remanded for the entry of findings required by Rule 52.

CONCLUSION

For these reasons, the order of the District Court restraining the Government from levying against Duffy's assets should be reversed insofar as it enjoins the Government from levying upon any of Duffy's assets other than its accounts receivable, and as to those assets the injunction should be limited to the levies now outstanding. With respect to Duffy's accounts receivable, the case should be remanded to the District Court in order for findings of fact and conclusions of law to be made, in accordance with the Rules.

Respectfully submitted,

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NOVEMBER, 1975.



CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 20<sup>th</sup> day of November, 1975, in an envelope, with postage prepaid, properly addressed to him as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6323. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

(a) [as amended by Sec. 101(a), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] Purchases [purchasers], Holders of Security Interests, Mechanic's Liens, and Judgment Lien Creditors.--The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

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(d) [as added by Sec. 236(a), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19] 45-Day Period for Making Disbursements.--Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by reason of disbursements made before the 45th day after the date of tax lien filing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest--

(1) is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321, and (B) covered by the terms of a written agreement entered into before tax lien filing, and

(2) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

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SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, supra] Tax.--Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

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SEC. 7426 [as added by Sec. 110(a), Federal Tax Lien Act of 1966, SUPRA]. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS.

(a) Actions Permitted.--

(1) Wrongful levy.--If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

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(b) Adjudication.--The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction.--If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) Recovery of property.--If the court determines that such property has been wrongfully levied upon, the court may--

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.





(3) Surplus Proceeds.--If the court determines that the interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any part of the amount of the surplus proceeds of such sale.

(4) Substituted Sale Proceeds.--If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

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Treasury Regulations on Procedure and Administration (1954 Code)  
(26 C.F.R.):

§301.7426-1 Civil actions by persons other than taxpayers.

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(b) Adjudication--(1) Wrongful levy. If the court determines that property has been wrongfully levied upon, the court may--

(i) Grant an injunction to prohibit the enforcement of such levy or to prohibit a sale of such property if such sale would irreparably injure rights in the property which are superior to the rights of the United States in such property; or

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